In the Supreme Court of the United States.

OCTOBER TERM, 1902.

P. H. KIRWAN ET AL.
v.
SIMON J. MURPHY ET AL. } No. 161.

APPELLANTS' REPLY BRIEF.

Before the preparation of the brief of appellants a brief by Mr. Benton Hanchett was filed for appellees. Since the preparation and filing of appellants' brief the appellees have filed two further briefs, one by Mr. M. H. Stanford and one by Mr. S. D. Luckett. For brevity, the last two will be designated herein, that by Mr. Stanford by the letter "S" and that by Mr. Luckett by the letter "L," each with page references.

Government not bound by acts of agents in same manner as private persons. In reply to S. 14–15.

Appellees contend that the Government is bound, in its transactions for disposal of the public lands, in the same manner as private persons. This is only qualifiedly true. The Government can deal only by agents—its officers. The powers of its agents are limited by public statutes, which are notice to the world.

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By the acts of its agents in clear violation of law the Government is not bound. Thus, in *Burfenning* v. *Railroad Company* (163 U. S., 321), this court held that an additional homestead entry permitted in an incorporated city by the land department, though carried to a patent signed by the President of the United States, and not assailed by the Government, and though the fact did not appear on the face of the patent or entry papers, was void, conveying no right or title whatever.

As shown in appellants' brief, pages 23–24, frauds of its officers do not conclude the Government as do those of agents of private persons when acting within their general powers.

Survey must precede disposition of public lands. Effect of plat of Howe survey as a representation. Iowa rule. In reply to S. 15–17.

No officer has power to dispose of public lands until a survey has been made. (Appellants' brief, 15–17, and *Schlosser* v. *Hemphill*, Iowa, June 3, 1902, 90 N. W., 842.) The law directs how surveys shall be made, and it may be admitted, for purpose of argument at this point, that a plat filed in the local land office—"the place of sale"—may be taken as a representation that a survey has been made of the lands thereon indicated. But is the Government estopped to assert that *lands not thereon indicated have not been surveyed?* Appellees (S. 15) assert that it is, and L. 20 so implies. The appellants say it is not. This is the gist of the contentions.

An estoppel can be no broader than the representation upon which it is based. The meander line merely represented that any land beyond that line *had not been surveyed.* As said by the court in *Niles* v. *Cedar Point Club* (175 U. S., 300, 308):

> All that can be said of it is that it is an irregular line which bounds a body of land, and beyond that boundary *there may be found forest or prairie, land or water, Government or Indian reservation.*

It represents merely that the surveyor has not set his foot or his instrument *there.* If, in attempting to describe what is beyond the line of his survey, he makes a mistake, or acts fraudulently, how can it be said that the Government is estopped?

The appellees (S., 106) make a pictorial representation of what they contend for, which, for all purposes of illustration, is the same as appellants' similar map (appellants' brief, 22). The difference is that appellees' map is drawn from a purported resurvey of the north two tiers of sections by County Surveyor Patton. The township is claimed to be 90 rods in excess north and south. Patton apportioned the excess ratably among the *interior* sections "where no monuments were found," (for *none ever had existed*), but was controlled by the section corners on the sides of the township *where section corners had been established*, and so the interior east and west lines are thrown by him into zigzags. For purposes of argument the plats are identical.

Obviously, the approved plat made from Howe's fictitious field notes (Record 14) *was not a representation that Howe had surveyed the land between that fictitious meander line and the actual lake into any such form of subdivisions reaching to the actual lake as is contended for by appellees' plat* (S. 106), and is approximately shown (plat, appellants' brief, 22). Such a survey, if made, would be so flagrantly in violation of express statute that it must have been annulled as soon as it came before the Commissioner of the General Land Office. The questions then arise:

How can the plat in the record at page 14 be construed as a representation that the survey was as contended and shown in plat S. 106? And can the court decree from the representation, plat record, 14, that the survey, plat S. 106, was made, and so *judicially violate the statute*, when the surveyor could not lawfully have been, and was not by the Commissioner of the General Land Office, permitted to do so? Appellants' contentions on this head and review of authorities are found in the appellants' brief (25 to 51). In addition to the Iowa citations there made (appellants' brief, 34 to 37) must be added *Schlosser* v. *Hemphill* (90 N. W., 842), June 3, 1902, wherein that court expressly adheres to its decisions in *Glenn* v. *Jeffrey* and *Grant* v. *Hemphill*, cited in appellants' brief, 34, and distinguishes and explains *Schlosser* v. *Crookshank* (96 Ia., 414), cited by appellees (S. 120) and which they have heretofore strenuously contended in effect overruled those decisions. Instead of overruling their former decisions,

the court affirms them, and thus settles the law of that State to be as defined in *Glenn* v. *Jeffrey* and *Grant* v. *Hemphill.*

Appellees' claimed bona fides. In reply to S. 17–54 and L. 6–10.

Appellees' next contention (S. 17 to 46) is that as a question of fact they were *bona fide* purchasers. Their testimony is set out at length to show that they purchased for value, believing that the fractional lots bordered by the fictitious meander line extended to and were bounded by the actual lake. The appellees' *bona fides* is not the crucial question, or yet a material one. An erroneous belief of the extent of their grantors' patents would not give appellees a greater area of land, or more extended title, than the patents conveyed. Whatever these patents conveyed, the patentees and the Government were concluded by them. (*Russell* v. *Maxwell Land Grant Company*, 158 U. S., 253, 259.) The question is purely one of boundaries, viz: Did the patents to the fractional lots convey to the meander line only, or did they include the land between the fictitious line and the actual lake?

But if appellees' *bona fides* be for purpose of argument conceded to be a material question, the record shows they had notice. (Appellants' brief, 51 to 56, and 69 to 78, inclusive.) The *land was there lying high above the lake* and clothed with a primeval forest of great "trees such as will not grow in water." There were no surveyors' marks or monuments there. Of at least eighty monuments and corners that should appear, seventy-eight do not appear. None but the quarter

post west side of section 36 and the northwest corner of that section exist or ever existed. Of the many blazed trees marking the surveyors' lines and the many marked witness trees to the seventy-eight interior corners never set (at least two to each corner), none were ever found, though such footprints or finger marks of the surveyor were all readily found on the exterior lines of the township which he did run. The appellees' expert timber cruiser, Eveleth, who understood running lines, was over the land before their purchase. *He noticed* (R., 122, 127) that it was "three-fourths of a mile," or "a little over," from the corner of sections 3 and 4 to the lake, when it should have been but 27 rods. It was 240 rods or more. He says (R., 127): "*There were no traces of any Government survey.*" "*I concluded the Government was not very strict in making their acceptance of surveys.*" "*It would show me that corners had not been established.*" "*There was no line established.*" There was therefore not only *the means of ascertaining the truth*, but also *the fact that appellants availed themselves of the means and actually observed and knew that no survey had been made of this land.* No amount of asseveration of ignorance and innocence can avail against *the proof of the fact of actual notice.*

The remainder of appellees' contention on this head (S. 46 to 54) is devoted to citation of decisions protecting *bona fide* purchasers—an unnecessary and, so to speak, an elementary proposition. But courts do not protect as *bona fide* purchasers those who, while in terms testifying they are such, clearly prove they are not.

The question is not as to the conclusiveness of the patents, but as to the extent and boundary of the tracts where a call is false. Reply to S. 54-57.

Appellees contend that a patent to land is the highest evidence of title, and that natural objects control courses and distances. As to the first part of this double proposition, no contention exists. The second part is also true as a general proposition, but having its recognized exceptions where a call is false or technical adhesion to it defeats the intent of the parties. The contention here is as to the boundary of the tract granted, the natural object not existing at or approximately near the meander line indicated in the fictitious field notes.

The patents must have operated at the moment of their issue to convey title to the precise tracts granted. The extent or form of the grant can not afterwards be changed by force of conditions existing, but unknown to the grantor at the date of the patent, as that would contravene the grantor's intent. If, therefore, the extraordinarily shaped tracts appellees claim were ever conveyed by the Government, they were so conveyed *and so were intended to be granted* at the date the patents for the lots were issued. A patent is not to be held void for uncertainty, and the extent of the grant must be determined by the patent itself. Hence, it can not be rationally presumed, in the case at bar, that it was intended to convey the absurdly formed tracts shown on the plat (p. 22) of the appellants' brief, or at S. 106. If the patents conveyed the land beyond the meander line, the form of the tracts must be ascertainable from

the terms of the patents or notes of *a survey upon which the patents are founded* fixing their boundaries and extent. The patents and plat to which they refer are the only permissible means from which to find the form and boundaries of the tracts granted. The patents give no description of their forms and the plat shows their forms are utterly unlike those the appellees claim, while the acreage shown on the plat as their forms appear there exactly coincides with the areas of the tracts formed as there shown.

Moreover, the fallacy of appellees' contention is shown by the fact that the patents, construed as they demand, would convey land in more than one section, contradicting the descriptive words of the patent itself, an inadmissible construction under *Horne* v. *Smith*, cited page 23 of appellants' brief.

The rule that monuments or natural objects control courses and distances has its exceptions and limitations, as is shown by many decisions of this and other courts collected in appellants' brief, 26 to 51.

The true rule is that *the existence of such monuments or natural objects failing at or approximately near the place indicated, the court seeks by aid of all the facts at its disposal to arrive at the real intention of the parties.* Upon this the appellants rest their contention.

It is not a conceded fact that a survey was made, but is insisted that no survey of the land in controversy was made. Reply to S. 57 to 70, L. 6 to 10

Appellees contend (S. 57 to 70) that from the record and conceded facts "it can not be questioned that a survey was actually made"—such as they ask to be

established by a decree. This claim is based on nothing more substantial than the averment in the bill, not admitted by the answer, and is in face of an express averment of the answer that Howe surveyed only the exterior lines of the township.

To the proposition "A" (S. 61) appellants make no contention. It must, however, be noted that counsel mistake both the facts involved in *Cragin* v. *Powell* (128 U. S., 691), therein cited, in that counsel say:

> The appellees claiming under the Wolf patent * * * claimed * * * that there was a strip of Government land left unsurveyed which did not pass to appellants' grantors, and was claimed under the Wolf patent from the State.

On the contrary, the court states the facts arising from the official survey by Connolly and a resurvey by McLeran, who claimed to have proceeded upon analogy to and in connection with Government resurveys by Gorlinski of adjoining townships (128 U. S., 693–694), that—

> These discrepancies are: (1) By the Gorlinski and the McLeran surveys the township *lacked* half a mile of being 6 miles square, *the eastern tier of sections thereof losing fully one-half of the area given by them in the official plat, which official survey establishes a full township as prescribed by law.*

Instead of there being an unsurveyed strip of a half mile wide, the attempt was to exclude from the township such amount of land actually surveyed, and then

adjust the tracts to a township line placed near to where the quarter line through the middle of the east tier of sections had been, thus shifting about a half a mile the actual location of all lands in the township! No such question as is stated in appellees' brief was presented in the case, and the point decided was that the power to make and also, with limitations indicated by the court, to correct surveys of public lands rests solely in the Land Department, and that when a survey *has in fact been made* and approved the courts have no jurisdiction to correct or vacate it.

The proposition "B" of this head (S. 68–71) is the gist of the whole controversy, involving the effect of a false call, the nonexistence of the natural object at or near its indicated place, and is discussed in the appellants' brief (25–51).

No resurvey of land once surveyed and sold is proposed to be made. The land in controversy has never been surveyed or sold. Reply to S. 71-72.

It is not questioned but that the rights of patentees to fractional lots bordered by Howe's fictitious meander line became fixed by the issue of patent. The controversy is as to *what those rights were*—whether the patents conveyed title to lands not surveyed and not in contemplation of the parties at the time of the grant.

This proposition and the eighth, S. 77, proceed upon the false assumption that the survey sought to be enjoined is a resurvey. It is not a resurvey, but an original one of a portion of township 57 north, range 17 west, omitted from Howe's survey.

The controversy is one of boundary—not of riparian rights. Reply to S. 72.

Appellees insist that a question of riparian rights is presented. Appellants (Government brief, 14) contend otherwise, and that the primary question, which must control all others, is the boundary or extent of the grant, where the monument or natural object—the lake—does not exist at or near the supposed meander line, but a large body of unsurveyed land lies between it and the meander line. In *Grand Rapids and Indiana Railway Company* v. *Butler* (159 U. S., 87) and *Hardin* v. *Jordan* (140 U. S., 371), relied upon by appellees, no question existed but that a survey had in fact been made to the shore. The questions were strictly what riparian rights passed by the grant.

Fraud of the Deputy-Surveyor does not conclude the Land Department. Reply to S. 77; L. 6 to 10.

Appellees again contend that because the Commissioner approved a plat made by the surveyor-general from fictitious field notes, such plat can not be questioned as to lands not therein represented to have been surveyed. This is but iteration in other words of the second, fifth, and sixth propositions, S. 15, 57, and 71, and gains no force by frequent iteration. The appellants contend, for reasons before shown, that no estoppel arose.

The Patton or county surveyor's survey was ineffectual and invalid, and the Minnesota statute under which it was attempted to be made has been declared unconstitutional by the supreme court of Minnesota. It moreover could not affect the land in controversy. Reply to S., 78-97.

Appellees at great length insist that "Plat No. 1," S. 98, and its derivative "Plat No. 2," S. 106, rather than map at page 22 of appellants' brief, are proper plats of the location and subdivision of the lands in controversy, if their contentions are sustained and they are adjudged owners of the lands. It is an immaterial contention, for two reasons: First. "If the Government, by fraud of Howe in returning fictitious field notes of a survey never made, has lost title to these lands, it is obviously a matter of no concern to the Government or its officers how the land shall be subdivided among the owners of lots bordering upon Howe's fictitious meander line, but concerns only those receiving the fruits of his fraud. A second answer is that appellees do not seek a decree defining the form in which the unsurveyed land shall be subdivided. If the Government is owner, the land must be surveyed, as nearly as may be in square tracts, in compliance with the statutes regulating surveys of the public lands.

The plat, appellants' brief 22, is for purposes of argument merely, illustrative of the effect of the decree appealed from, establishing a survey as having been made violative of the statutes for surveys of the public lands. The two plats—that at appellants' brief 22 and that at S. 106, as shown (*supra*)—are for that purpose equivalents. The appellants will not be diverted from the real contentions involved by an insistence upon fictitious and immaterial questions, and thereby participate in or give countenance to an effort to confuse or to mislead the court into a consideration of them.

But this Patton, or county surveyor's, survey, though much importance is given to it in appellees' brief, can have no bearing here, or respecting the lands in controversy, for three obvious reasons:

(*a*) If the land in controversy is unsurveyed public land of the United States no survey of it by State authorities can have any validity. It must be surveyed under direction of the land department and in accordance with the laws of the United States for survey of the public lands.

(*b*) The Patton survey only assumed to establish "lost corners" and to retrace lines supposed to have been run by Howe, as indicated in his fictitious field notes, and so did not go inside of or set corners inside of Howe's meander line, or assume to subdivide the unsurveyed land lying between the fictitious meander line and the actual lake. Patton's lines are outside the fictitious meander line and affect only land outside such line.

(*c*) The statute under which the Patton survey was ordered and made was declared unconstitutional by the supreme court of Minnesota in *Davis* v. *Board of County Commissioners* (65 Minn., 310). That survey must be regarded as one made without authority of law and is therefore ineffectual and void.

Appellees misconstrue the decision in the French-Glenn Stock Company v. Springer. Reply to S. 97-102.

Appellees assert that the last expression of the court in *French-Glenn Company* v. *Springer* (185 U. S., 47) gives color to their contentions. The facts in that

case were in many respects parallel with those in the case at bar. Applied to the facts of this case that decision seems controlling. Here, as there, no lake existed at or approximately near the fictitious meander line; there had been no recession of its waters. Such being the parallel facts, the conclusion seems to follow, as said by the court (185 U. S., 52), that—

> * * * if there never was such a lake—*no water forming an actual and visible boundary—on* the north end of the lots, *it would seem unreasonable*, either to prolong the side lines *of the survey indefinitely until a lake should be found, or to change the situs of the lots laterally in order to adapt* it to a neighboring lake. * * *

The necessity to resort to a radical subdivision of the unsurveyed land is self-destructive of appellees' contention that a survey was made. Reply to S. 102–114.

Appellees are driven to contend for application to this case of the riparian rule for division of reliction and accretion by radial extension of boundaries of riparian proprietors. A fatal objection to this is that there has been no reliction or accretion to which such rule could apply, and it is therefore necessary to adjudicate that a survey was originally so made and approved in face of a statute requiring surveys to be in square form. While it is clear from the record that the land department did not and, presumably, could not have so flagrantly violated the law, yet the court with full knowledge of such fact is asked to decree that it did. This is nothing less than to ask the court itself to violate the statute through the form of an

untrue decree that the land department did. The proposition dissected and laid bare is well calculated to shock judicial conscience.

This is the refuge to which appellees are *coerced*, for by no other extension of the lines of survey could the water be reached without inextricable confusion and overlapping. So the appellees by the necessities of their contention are *coerced* to this self-destructive proposition.

In support of this contention appellees cite a group of cases none of which except *Cragin* v. *Powell*, noticed *supra*, arose upon a survey under statutes now existing which require definite square subdivisions of public lands. Among these cases is *St. Clair Company* v. *Livingston*, a case of riparian accretion. The decisions cited have no other relevance here than to support the two general propositions—not by appellants disputed—that a meander line is not in general a boundary, where laid along or approximately near a body of water; and that monuments and natural objects in general control courses and distances.

Departmental decisions not inconsistent with appellants' contentions. Reply to L. 11 to 25.

Appellees' brief, by Mr. Luckett, 11 to 25, is given to a general review of departmental decisions in what are claimed to have been similar cases. A reading of the cases will show that each and every of them differs from that at bar in the essential respect that *an actual survey had been made*. In La Follette's case (26 L. D., 453, 466), the south line of the section "was

run east until it 'struck the bank of Lake Michigan,' where a post was set." So also of the north line. Without reviewing the cases severally, this fact will be found existing in them all.

Where there has been an actual survey pursuant to which the Government has sold the lands and years have elapsed, the Land Department does not readily make corrective surveys to the unsettling of rights acquired in faith of surveys actually made upon which the Department and parties have acted in good faith, even though they may turn out to be erroneous.

Such a case was the recent one of Stensland (L. 21 to 28). The survey was made in 1858 and its accuracy had never been assailed. The meander line marking and bounding what should pass to the future State as its tide lands was actually run. The State, at its admission into the Union in 1889, thirty-one years after the survey, accepted and acted upon it and sold the excluded land. Though it was alleged that the line along Bakers Bay excluded some lands not properly tide lands, it appeared to the Department upon an examination of the official plat and of plats purporting to represent the true and very irregular water line that the case did not show fraudulent conduct of the surveyor, and that after forty-four years of acquiescence by the Government it was improper to disturb the titles so acquired from the State. In any event the real facts and the conclusion were not happily stated in the decision and it has been recalled for further consideration.

The great excess of quantity shows that no survey was in fact made, and that neither the Government, the entrymen, or the appellees could understand that the lands in controversy were granted.—Reply to S. 115–124.

Appellees' endeavor to minimize the effect of the great excess of quantity as an incident showing the intent and understanding of the parties and showing that no survey was in fact made. It is not material how much of that excess appellees would receive, but the aggregate excess, or quantity lost, must be considered in determining the weight to be given to it. Approximately 1,200 acres of valuable forested lands were falsely returned as part of a supposed lake of 1,800 acres, not by a process of inclusion and exclusion of arms of water and points of land, or because of any difficulty in following the sinuosities of the shore, but such compact and extensive bodies of land as conclusively show that no attempt at an actual, approximately accurate meander was attempted.

Excess area does not, of itself and alone, vitiate a survey made, but irregularities so great and so gross as to be startling are circumstances for consideration in determining the intent of the parties, and whether there was a survey or a fraud. That is all that appellants assert and is discussed (appellants' brief, 52–56); and the principal authorities appellees rely upon—*Newsom* v. *Prior* (7 Wheat., 7), and McIvers Walker (9 Cranch, 173)—are there discussed (appellants' brief, 56–60).

The asserted grounds of equitable jurisdiction are based upon a false assumption of the whole matter in controversy. Reply to S. 124,138.

The contentions that the court had jurisdiction to enjoin the survey, especially subdivisions a, b, c, and d (S. 124–136), proceed upon a false assumption of the entire subject of controversy as the premise upon which they rest. It may be conceded for argument here that if the patents for the irregular lots bounded by the fictitious meander line operated to convey title to all the unsurveyed land between that line and the lake, *then* defendants had no business there and the threatened trespass may be enjoined. But *if such patents did not so operate, or if the court can not in this form of action adjudicate that question as against the Government or the settlers, who are not made and can not be made parties to the bill*, so that the premise fails or is in doubt, then what becomes of the argument founded upon it and the conclusion deduced from it? Obviously there is no jurisdiction in equity of the subject-matter. The appellants' brief, 69–78, discusses that question.

The remainder of this contention, E., S. 136–138, is that the acts sought to be enjoined are ministerial only, and also rests upon the same false or assumed premise. The act of survey of public lands is clearly not ministerial, but administrative in character. (Appellants' brief, 78–83.) The survey of public lands never in fact surveyed is purely an administrative matter of which the courts have no jurisdiction. The court in *Russell* v. *Maxwell Land Grant Company* (158 U. S., 253, 259) makes the clear distinction and says that:

> It may be well to notice a distinction which interprets some dicta and decisions found in

respect to the jurisdiction of courts over boundaries. Whether a survey as originally made is correct or not is one thing, and that, as we have seen, is a matter committed exclusively to the Land Department, and over which the courts have no jurisdiction otherwise than by original proceedings in equity. While on the other hand, where the lines run by such survey lie on the ground, and whether any particular tract is on one side or the other of that line, are questions of fact which are always open to inquiry in the courts.

The lands in controversy here have never been surveyed. It is not proposed to resurvey lands once surveyed and disposed of, but to survey six specific unsurveyed sections of public lands. The proposed survey is original of lands omitted by Howe. It is, therefore, an administrative proceeding of which the courts have no jurisdiction.

The appellees have the affirmative and must show that they own the lands, by patent from the Government, the survey of which they seek to prevent. Reply to S. 138.

Appellees seem to contend, S. 138, that appellants upon the averments or conclusions of law of the bill are put upon the affirmative. Be the onus much or little, it clearly lies upon appellees to show such facts and legal rights as entitle them to the aid of chancery for their protection.

This proposition in fact stands upon substantially the same assumed premise as the last foregoing, viz, all claim of appellees of the extent and effect of the patents to the fractional lots bordering the fictitious

meander line are assumed to be true. Except and apart from the validity of such assertion, the proposition is ineffective.

There is no equity in the bill. Reply to S. 139-170; L. 2-6.

The different grounds for invoking the power of chancery for protection of legal rights advanced by appellees are discussed in appellants' brief, 60–83, to which reference is made without repetition or extended comment here.

Respectfully submitted.

WILLIS VAN DEVANTER,
Assistant Attorney-General.
JOSEPH R. WEBSTER,
Assistant Attorney.

NOTE.—Mr. John R. Van Derlip, counsel for the settlers upon these lands, who intended to participate in oral argument, has been prevented from attendance. His views of the legal questions involved are expressed in the letter printed as an appendix to this reply brief, to which letter attention is invited.

APPENDIX.

MINNEAPOLIS, MINN., *January 22, 1903.*

Hon. WILLIS VAN DEVANTER,
Department of the Interior,
Washington, D. C.

DEAR SIR: By reason of certain litigation pending in the district and supreme courts of this State, I shall be prevented from being present, as I had hoped to be, at the argument of the case of *Kirwan* v. *Murphy* in the Supreme Court of the United States, if it come up for argument, as the clerk advises me that it probably will, during the week beginning January 26.

I have recently received a copy of the brief for the appellees in that case and venture to direct your attention to one or two matters therein.

1. The entire contention of the appellees is based upon the false assumption that the patents under which they claim purport to convey all of the land down to the water line of Cedar Island Lake. This false assumption is the basis for the argument that the good faith of the appellees in acquiring the land from the patentees is a material circumstance. It is also the basis for the appellees' contention that the question involved in the case is not one of boundaries but of riparian rights.

2. The *bona fides* of the appellees, instead of being the crucial question in the case, is an entirely immaterial matter, for the reason that the appellees acquired,

and could acquire, no better title or greater territory than the patentees, their grantors, possessed under the patents. (*Russell* v. *Maxwell Land Grant Co.*, 158 U.S., 253, 259.)

3. It follows that the question involved is purely one of boundaries; that is, did the patents for the fractional Government lots convey to the meander line only, or did they include the land intervening the meander line and the lake?

4. The appellees contend that, notwithstanding the system under which the survey of this township purports to have been made, the lines of the fractional Government lots may be deflected in any direction as much and as far as may be necessary in order to reach a water boundary upon Cedar Island Lake. This is manifestly erroneous.

(*a*) It is palpable that, *at the moment of its issue*, a a patent conveys the precise tract of land granted thereby, and the extent or conformation of the grant can not be subsequently changed by mere force of conditions unknown at the date of issuance of the patents. It follows, therefore, that if the extraordinary tracts of land now claimed by the appellees have ever been conveyed by the Government, they were so conveyed (and so intended to be granted) at the time the patents for the various Government lots were issued.

(*b*) If any principle of law be established, it is the principle that the description in a patent must be *certain*, if the patent is not to be held void for uncertainty, and it is a cardinal rule that the extent of the grant must be determined by the patent itself.

Hence the argument at page 22 of the Government brief, that it can not be rationally presumed that, in the instance at bar, it was intended to convey the

absurdly formed bodies of land shown upon the plat facing that page, is uncontrovertible.

The necessity for the existence and enforcement of the principles above stated is conclusively exemplified by a comparison of the plat referred to with the one facing page 106 of the appellees' brief, where a similar attempt is made to illustrate the outlines of the various lots conveyed by the patents under which the appellees claim. Which is correct? If the patents conveyed the land beyond the meander line, there must be something in their terms to indicate the fact, and to indicate also the exact boundaries of the various tracts. As I have stated, the patents are the only criteria, and they provide no data for the determination of these questions beyond their reference to the plat (which shows the configuration of the tracts to be entirely different from that claimed by the appellees or shown upon the plat at page 22 of the Government brief) and the expressed acreage, which exactly coincides with the area of the fractional lots shown upon the plat.

5. Another important, and controlling, consideration in this connection, demonstrating the fallacy of the appellees' position, is that the patents, construed in the manner demanded by the appellees, would convey land in more than one section, which is an impossible construction under *Horne* v. *Smith*, cited on page 23 of the Government brief.

6. In the point beginning on page 78 of the Government brief, with reference to the exclusive jurisdiction of the Land Department, the following language from *Russell* v. *Maxwell Land Grant Co.* (158 U. S., 259), seems directly applicable:

In this connection it may be well to notice a distinction which interprets some dicta and decisions found in respect to the jurisdiction of courts over boundaries.

Whether a survey as originally made is correct or not is one thing, and that, as we have seen, is a matter committed exclusively to the Land Department, and over which the courts have no jurisdiction otherwise than by original proceedings in equity.

7. It is another false assumption on the part of the appellees (*passim*, but particularly in points VI, page 71, and VIII, page 77 of brief) that the survey sought to be restrained is a *resurvey*. It is not. It is a survey of that portion of township 57, range 17, *which was omitted* from the Howe survey.

8. Much reference is made to the so-called Patton survey, under which it is asserted that the division lines established by it are now recognized, and therefore should not be changed. I can not see that this survey has any bearing in the case.

(*a*) The division lines referred to are upon property outside of the land in controversy and to be embraced in the survey ordered by the Land Department.

(*b*) The statute under which the survey was made has been declared unconstitutional by the supreme court of Minnesota, so that the survey made by Patton, as county surveyor of St. Louis County, is void and ineffectual (*Davis* v. *Board of Co. Comm'rs*, 65 Minn., 310).

Special references to this survey in the brief for the appellees are found on pages 78 to 94, and 147 to 154.

9. The case of *Schlosser* v. *Hemphill* (90 N. W. Rep., 842) recently decided by the supreme court of Iowa, should be cited at the bottom of page 15 of the Government brief in support of the statement that a survey of Government land is a necessary prerequisite to the passing of title from the Government. It should also be cited at the top of page 37 as an additional case declaring that where no meander line was actually run,

or where the meander line as run does not approximately indicate the water-line, the meander becomes a boundary.

This case is important in that it reaffirms the doctrine of *Glenn* v. *Jeffrey* (75 Ia., 20) and *Grant* v. *Hemphill* (92 Ia., 218), and substantially overrules the case of *Schlosser* v. *Cruickshank* (96 Ia., 414), which has heretofore been strongly urged by the appellees as overruling the doctrine of the two cases just referred to, and is cited in the appellees' brief on page 160.

I regret that it has been impossible to obtain the consent of all parties to an advancement of the cases of the *Security Land and Exploration Company* v. *Burns and Weckey.*

Yours, respectfully,

JOHN R. VAN DERLIP.